

EXHIBIT "A"
STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

FILMED

APR 5 1990

IN THE MATTER OF APPLICATIONS
FOR BENEFICIAL WATER USE PERMIT
NO. 1819-s40J AND NO. 3051-S40J
BY RUSSELL S. UNRUH

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Pursuant to the Montana Water Use Act and the Administrative Procedures Act, after due notice a hearing was held on January 22, 1975, at Chinook, Montana, for the purpose of hearing objections to the above-named applications.

The Applicant, Russell S. Unruh, appeared at the hearing and presented testimony. He was not represented by counsel.

Robert Sivertsen and the Matheson Ditch Company filed objections to both Application 1819-s40J and Application 3051-s40J. Mr. Sivertsen did not appear at the hearing nor did he send a representative. Wallace Warburton, president of the Matheson Ditch Company, and Carson Corrigan, a shareholder in of the Matheson Ditch Company, appeared at the hearing and presented testimony. The Matheson Ditch Company was represented by counsel, Stuart MacKenzie, Esq., of Chinook, Montana.

Joey Malsome and John Courtier, both shareholders in the Matheson Ditch Company, appeared at the hearing and presented testimony.

Bob Watkins, a member of the Board of Directors of the North Chinook Irrigation Association and a farmer on Battle Creek, appeared at the hearing and presented testimony.

A Proposed Order (Proposal for Decision) on the above hearing was issued by the Hearing Examiner, James A. Lewis, on April 16, 1975. The Proposed Order specified that the Proposed Order would become final when accepted by the Administrator of the Water Resources Division of the

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Department of Natural Resources and Conservation, that written exceptions to the Proposed Order must be filed with the Department within ten (10) days of receipt of same, and that upon receipt of any written exceptions by the Department, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On April 29, 1975, the Department received a typed letter dated April 26, 1975, from Mr. Unruh taking Exception to the Proposed Order as entered by the Hearing Examiner in the matter of Application 1819-s40J and Application 3051-s40J by Russell S. Unruh.

The Department by letter of June 10, 1975, to Mr. Unruh, acknowledged receipt of Mr. Unruh's Exception and informed him of his opportunity to file a brief supporting his Exception to the Proposed Order within fifteen (15) days upon receipt of the Department's notice. He was further advised that if so requested, a hearing in Helena before the Water Resources Division Administrator could be held at a later date for the purpose of presenting oral argument in support of the exception and briefs filed. Mr. Unruh was requested to indicate, if he filed a brief, his wishes in making oral argument before the Water Resources Division Administrator. Copies of this letter were also sent to Robert Sivertsen, Stuart C. MacKenzie, and Wallace Warburton.

Mr. Unruh by letter dated June 24, 1975, stated, "In regards to your letter of June 10, 1975, I will file no briefs supporting my letter of exceptions dated April 26, 1975."

By letter of August 6, 1975, to Mr. Unruh, the Department made reference to Mr. Unruh's Exception to the Proposed Order and his wish not to file any supporting brief. He was also informed that the two objectors in this matter would be informed of their opportunity to file briefs within ten (10) days after receipt of the Department's notice. Mr. Unruh was further informed

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in said letter that it seemed apparent that the best he could expect from the two applications is 250 acre-feet from Link Coulee and 250 acre-feet from Battle Creek, with a combined total of 500 acre-feet from both sources. He would be limited to these amounts from the two sources, since that is the way the applications read and were published. Also, it appeared under the present circumstances of the applications that, if available, all 500 acre-feet could not be appropriated from Link Coulee but only the 250 acre-feet applied for from that source. If he was eventually granted the full amounts of the two applications, it appeared another application or change may be necessary to allow the appropriation of all available water from Link Coulee and overflow water from the North Chinook Reservoir.

The Department by letters of August 6, 1975, informed Stuart C. MacKenzie, attorney for the objector, Wallace Warburton of the Matheson Ditch Company, and Robert Sivertsen, another objector, that Mr. Unruh had declined the opportunity to file a brief supporting his Exception; therefore they were advised of their opportunity to file a brief within ten (10) days after receipt of the Department's notice and request an oral argument hearing in Helena before the Water Resources Division Administrator, if they so wished. Copies of said letters were sent to Wallace Warburton and Russell S. Unruh.

On August 27, 1975, the Department received a Brief in Opposition to Exceptions from Stuart C. MacKenzie on behalf of Matheson Ditch Company, dated August 26, 1975. Mr. MacKenzie in his attached cover letter stated, "We do not request to make an oral argument before the administrator."

Mr. Sivertsen did not respond or in any way file a brief or request oral argument.

The Department by letter of February 10, 1976, to Mr. Unruh, stated that this matter would be forwarded to the Administrator of the Water Resources Division for preparation and issuance of a Final Order, based on the record

at present in the application files. Before this was done, however, Mr. Unruh was advised in said letter of his right to request in writing an oral argument hearing on his Exception. Mr. Unruh was further advised that if a request for oral argument was not received by February 20, 1976, the Administrator would issue his Final Order on the record in the application files at present. Copies of this letter were sent to Robert Sivertsen, Stuart C. MacKenzie, and Wallace Warburton. The Department did not receive a written request from Mr. Unruh by February 20, 1976, for an oral argument hearing on his Exception.

Since none of the parties in this matter requested an oral argument hearing on the objections, exception, and brief before the Administrator, the Administrator of the Water Resources Division hereby makes the following Final Order, based on the Proposed Order of April 16, 1975, the objections, exception, brief, and all pertinent information filed by parties to this matter, and made a permanent record of the applications.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on April 16, 1975, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order; except that the Proposed Order is hereby modified as follows:

FINAL ORDER

A. Application No. 1819-s40J

1. The Applicant's Provisional Permit is hereby conditionally granted for Application 1819-s40J to appropriate high, spring runoff and flash floods when available and not needed to satisfy prior water-right users downstream in Battle Creek, 250 acre-feet of water per annum from Link Coulee, and overflow water from the North Chinook Reservoir, tributary to Link Coulee, all tributary to Battle Creek, which is a tributary of the Milk River, in Blaine County, Montana. The water is to be impounded in a 250-acre-foot

storage reservoir on Link Coulee at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 35 North, Range 18 East, M.P.M. Water will be released from said storage reservoir when needed, into Battle Creek, and pumped from Battle Creek by existing pump sites located in Section 13, Township 35 North, Range 18 East, and Section 18, Township 35 North, Range 19 East, and used for irrigation on 30 new acres in the NE $\frac{1}{4}$ of Section 13 and supplemental water for irrigation on 90 acres in the SW $\frac{1}{4}$ of Section 12, 35 acres in the NW $\frac{1}{4}$ and 30 acres in the E $\frac{1}{2}$ of Section 13, all in Township 35 North, Range 18 East, M.P.M., and supplemental water for irrigation on 27 acres in the W $\frac{1}{2}$ of Section 18, Township 35 North, Range 19 East, M.P.M., and containing a total of 212 acres, more or less, to be used from March 15 to October 15, inclusive, of each year.

2. Water may only be appropriated and used during the periods noted in Condition 1 above, when the same is available and flowing for use without adversely affecting prior downstream water users on Battle Creek.

3. The Provisional Permit is subject to the permanent installation of an adequate drainage device, channel, bypass, or any other necessary means to satisfy prior existing water rights, as well as an adequate spillway or trickle tube to carry any excess floodwaters from Link Coulee or overflow waters from the North Chinook Reservoir into Link Coulee. Any said permanent drainage device must be at least 18 inches in diameter and located in the center of the dam.

4. The storage reservoir dam on Link Coulee must conform and be constructed to the engineering design, specifications, and safety standards of the local Soil Conservation Service for a dam of this type. Said plans and specifications for the dam must be submitted to and approved by the Department engineering staff before construction may commence.

5. The Provisional Permit is granted subject to all prior existing water rights in the sources of supply, and any final determination of prior existing

water rights as provided by Montana law.

6. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

7. In the event that any of the objectors or other existing water-right users have factual proof within a three-year period after the effective date of this order showing that they are being adversely affected as a result of the Permittee's appropriation during the periods granted to the point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing, by certified mail, immediately of such alleged factual adverse effect, and upon receipt of said notice the Department will conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Division, after consideration of all facts presented, will issue an appropriate order to all concerned parties, including any modification of the permit, if necessary. The Order, as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or in an extreme case, revoke Provisional Permit No. 1819-s40J.

B. Application No. 3051-s40J

1. The Applicant's Provisional Permit is hereby conditionally granted for Application 3051-s40J to appropriate high, spring runoff and flash floods when available and not needed to satisfy prior water-right users downstream in Battle Creek, 250 acre-feet of water from Battle Creek, a tributary of the Milk River, in Blaine County, Montana. The water is to be appropriated from

Battle Creek by means of a 50-horsepower, 3,400-gpm pump, at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 35 North, Range 18 East. Said water will be pumped through a pipeline and stored in a 250-acre-foot storage reservoir on Link Coulee, at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 35 North, Range 18 East, M.P.M., and used in conjunction with and supplemental to Application 1819-s40J, and used for irrigation on 30 new acres in the NE $\frac{1}{4}$ of Section 13, and supplemental water for irrigation on 90 acres in the SW $\frac{1}{4}$ of Section 12, 35 acres in the NW $\frac{1}{4}$ and 30 acres in the E $\frac{1}{2}$ of Section 13, all in Township 35 North, Range 18 East, M.P.M., and supplemental water for irrigation on 27 acres in the W $\frac{1}{2}$ of Section 18, Township 35 North, Range 19 East, M.P.M., and containing a total of 212 acres, more or less, to be used from March 15 to October 15, inclusive, of each year.

2. Water may only be appropriated from Battle Creek and used during the periods noted in Condition 1 above, when the same is available and flowing for use without adversely affecting prior downstream water users on Battle Creek.

3. The Provisional Permit is subject to the condition that an adequate measuring device be installed and maintained, and accurate records kept of all periods of diversion and quantities of water diverted and said records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

4. The Provisional Permit is granted subject to all prior existing water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

5. In the event that any of the objectors or other existing water-right users have factual proof within a three-year period after the effective date of this order showing that they are being adversely affected as a result of the Permittee's appropriation during the periods granted to the

point that they cannot reasonably exercise their prior water rights under any changed conditions, they must inform the Department and the Permittee in writing by certified mail, immediately of such alleged factual adverse effect, and upon receipt of said notice the Department will conduct a full field investigation of the alleged factual adverse effect, prepare a written report of the findings, and the Administrator of the Water Resources Division, after consideration of all facts presented, will issue an appropriate order to all concerned parties, including any modification of the permit, if necessary. The Order, as issued, shall be final in answering the alleged adverse effect and may further condition, modify, or in an extreme case, revoke Provisional Permit No. 3051-s40J.

6. The issuing of this Provisional Permit by the Department in no way reduces the Permittee's liability for damage caused by the Permittee's exercise of his Provisional Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of his Provisional Permit.

Done this 24th day of June, 1976.

Orin Ferris
Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

IN THE MATTER OF APPLICATIONS }
FOR BENEFICIAL WATER USE PERMIT }
NO. 1819-s40J and 3051-s40J, BY }
RUSSELL S. UNRUH }

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use and Administrative Procedure Acts,
after due notice, a hearing was held on January 22, 1975, at Chinook, Montana,
for the purpose of hearing objections to the above-named applications.

The Applicant, Russell S. Unruh, appeared at the hearing and presented
testimony. He was not represented by counsel.

Mr. Robert Sivertsen and the Matheson Ditch Company filed objections
to both Application No. 1819-s40J, and Application No. 3051-s40J. Mr. Robert
Sivertsen did not appear at the hearing nor did he send a representative.
Mr. Wallace Warburton, President of the Matheson Ditch Company, and Mr. Carson
Corrigan, a shareholder in the Matheson Ditch Company, appeared at the hearing
and presented testimony. The Matheson Ditch Company was represented by counsel,
Mr. Stuart MacKenzie, Esq., of Chinook, Montana.

Mr. Joey Malsome and Mr. John Courtier, both shareholders in the Matheson
Ditch Company, appeared at the hearing and presented testimony.

Mr. Bob Watkins, a member of the Board of Directors of the North Chinook
Irrigation Association and a farmer on Battle Creek, appeared at the hearing
and presented testimony.

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The Applicant offered into evidence U.S. Geological Survey flow records (1950 - 1973) compiled on a monthly and annual runoff basis as taken at the International (Canada-United States) Boundary on Battle Creek, East Fork of Battle Creek, Woodpile Coulee, and Lyons Coulee Creek. This compilation was accepted into evidence as Applicant's Exhibit No. 1 without objection. The Applicant also offered into evidence a graph drawn by himself to show the 23-year-average monthly measured runoff for Battle Creek at pump site for Link Coulee Dam, which includes the months of March 15 through October 15. Mr. MacKenzie noted that this graph had been prepared from measurements taken at the International Boundary and not from measurements taken at the pump site. Otherwise this graph was accepted into evidence as Applicant's Exhibit No. 2 without objection.

Mr. MacKenzie offered into evidence a certified copy of a Notice of Appropriation of Water filed in the name of John W. Clark and others with a priority date of September 19, 1895. This copy was received into evidence without objection as Objectors' Exhibit No. 1. Mr. MacKenzie also offered into evidence a copy of a USGS computation of the natural flow of Battle Creek at the International Boundary. This copy was received into evidence without objection as Objectors' Exhibit No. 2. Mr. MacKenzie also offered into evidence a copy of a Historical Summary of March to October Division of Natural Runoff for the Battle Creek Basin expressed in acre-feet, covering the years 1940-1972. This copy was received into evidence as Objectors' Exhibit No. 3 without objection.

Battle Creek is also known as the North Fork of the Milk River and was referred to as such at the hearing.

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PROPOSED FINDINGS OF FACT

1. On March 18, 1974, the Applicant submitted an Application for Beneficial Water Use Permit No. 1819-s40J seeking to appropriate 250 acre-feet per annum of water from Link Coulee, a tributary of Battle Creek, which is a tributary of the Milk River in Blaine County, Montana.

On March 18, 1974, the Applicant submitted Application No. 3051-s40J seeking to appropriate 7.57 c.f.s. not to exceed 250 acre feet per annum of water from Battle Creek. Both applications propose to divert water from Battle Creek by means of a pump at a point in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, T.35N., R. 18 E., and impounded in a reservoir on Link Coulee at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T. 35 N., R. 18 E., and used for irrigation on a total of 212 acres, more or less, from March 15 to October 15, inclusive, of each year.

2. On November 18, 1974, Mr. Robert Sivertsen filed objections to both of the above-named applications. The deadline for the filing of objections as stated in the legal notice published in the Chinook Opinion was November 15, 1974, and consequently these are not valid objections. Mr. Sivertsen did not appear at the hearing.

On November 15, 1974, Mr. Stuart MacKenzie, Esq., filed timely objections to both applications on behalf of his client, the Matheson Ditch Company. The grounds for the objections are: "To grant the application of Mr. Unruh would adversely affect the prior rights of the Matheson Ditch Company, since there are no unappropriated waters in Battle Creek."

3. The Applicant testified that he was aware of the water rights on Battle Creek of the Matheson Ditch Company and at least 13 other appropriators, and that

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he had no intention of infringing on any water rights on Battle Creek.

He explained his application, "A dam is to be built on Link Coulee. Pump to be installed in Battle Creek to supplementary fill dam while Battle Creek is at high runoff stage. Water is to be released from the dam into Battle Creek to supplement water supply for existing and new irrigation systems. During the past years, there has been a serious shortage of water for 2nd cuttings of hay."

Mr. Unruh said that by high runoff stage, he means when snow melts in the spring or heavy rain falls in the summer causing Battle Creek to run at a high rate.

He said that according to U. S. Geological Survey data, the 23-year-average measured annual flow at the International Boundary of Battle Creek and its tributaries is approximately 30,000 acre-feet.

He said that as near as he can determine there are approximately 1,800 acres irrigated from Battle Creek between the International Boundary and the Milk River. If the annual rate of water application were 3 acre-feet per acre, then the total annual water appropriations would be 5,400 acre-feet. These figures indicate that 24,600 acre-feet of water annually flow into the Milk River without being put to beneficial use.

Mr. Unruh said that the Soil Conservation Service had surveyed the damsite and estimated that the dam would require 19,000 cubic yards of dirt. He said the plans call for a trickle tube 3 feet in diameter with a stand pipe 4 feet in diameter. The top of the stand pipe is to be 6 to 7 feet below the level of the spillway. This trickle tube with stand pipe is to be installed because the slopes of Link Coulee are steep and make spillway construction difficult.

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Mr. Unruh said that he would not pump from Battle Creek when the downstream appropriators need the water.

Mr. Unruh said he felt that when water is running into the Milk River at the confluence of Battle Creek with the Milk River that there is plenty of water for all the downstream appropriators.

4. Mr. Unruh testified that in years past there has, at times, been considerable flow into Link Coulee from the overflow through the spillway of the North Chinook Reservoir.

Mr. Bob Watkins, a Director of the North Chinook Irrigation Association, testified that the Association intended to stop the practice of releasing water into Link Coulee. Mr. Watkins said that in the past few years the Association has closed the diversion gates when the North Chinook Reservoir is full and thereby let the water continue on down Lodge Creek.

5. Mr. MacKenzie requested that the 3-foot trickle tube or some other adequate drainage device be placed in the bottom center of the dam in Link Coulee so that the dam would not impound water all the time. Mr. MacKenzie said that there might be times when a rain or hail storm would create a substantial flow of water in Link Coulee without creating a like flow in Battle Creek or any of its other tributaries. In this instance, water to which the Matheson Ditch Company has apparent prior existing water right would be impounded by the Link Coulee dam because of the manner in which the 3-foot trickle tube is placed in the dam. Mr. MacKenzie said that the 12-inch diameter pipe in the bottom center of the dam would not convey a flow of water sufficient to reach the Matheson Ditch Company's point of diversion.

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6. Mr. Warburton testified that the main concern of the Objectors is that the 3-foot trickle tube is not an outlet. He said the reservoir would have to fill to the top of the stand pipe before water would be released from the reservoir. He said that a cloudburst would nearly fill the reservoir before water flowed downstream. He testified that Matheson Ditch Company has about 500 acres under irrigation.

7. Mr. Warburton testified that the Matheson Ditch Company operated under a water right filed in the name of John W. Clark on September 19, 1895. This water right is evidenced by Objectors' Exhibit No. 1.

8. Mr. MacKenzie said that Battle Creek is dry most of the year, but that usually in April and May, Battle Creek has excess flow. This fact is evidenced by Objectors' Exhibits 2 and 3.

9. Mr. Unruh testified that usually if Link Coulee is running a sizable flow of water, then Battle Creek and its other tributaries are also running a sizable flow. He said the Matheson Ditch Company's points of diversion are 20 miles downstream from Link Coulee. Mr. Unruh said the U. S. Geological Survey data compiled in Applicant's Exhibits 1 and 2, indicated that the high spring runoff usually occurred in March, April, May, and June, and that during these months Battle Creek contained a large quantity (est. 23,000 acre-feet) of unappropriated water.

Mr. Unruh said that he would like to appropriate water during this high spring runoff. He said he would also like to be able to appropriate water in times of high runoff caused by summer cloudbursts.

Mr. Unruh said that Link Coulee had a drainage area of about 5 sections and that the Soil Conservation Service estimated the average annual runoff to be about 65 acre-feet.

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PROPOSED CONCLUSIONS OF LAW

1. Approval of this application without conditions could adversely affect the Objectors' apparent prior existing water rights.
2. There are unappropriated waters in Battle Creek and Link Coulee.
3. The Department requires that all dams be equipped with a drainage device located on the bottom center of the dam.

PROPOSED ORDER

The Applicant's Provisional Permits be granted subject to:


1. The Permit issued pursuant to Application 1819-s40J be limited to 65 acre-feet per annum from the source of Link Coulee; Permit 3051-s40J be issued for 250 acre-feet from the source of Battle Creek.
2. All prior existing water rights.
3. Installation of a drainage device at least 24" in diameter located in the center of the dam.
4. That the Applicant not impound water from the source of Link Coulee except when water is flowing from Battle Creek into the Milk River.
5. A condition that the Applicant not divert water from Battle Creek except when water is flowing from Battle Creek into the Milk River.
6. The Applicant shall by telephone or other method determine if water is flowing from Battle Creek into the Milk River.

NOTICE

This is a proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation. Pursuant to Section 82-4212, R. C. M. 1947, and Rule MAC 1-1.6 (2)-P6190, written exceptions to this Proposed Order may be filed with the Administrator within ten (10) days of the service of this Proposed Order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

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DATED this 16th day of April, 1975.


JAMES A. LEWIS
Hearing Examiner

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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|---------------------------------------|-------------|
| IN THE MATTER OF THE APPLICATION) | |
| FOR EXTENSION OF TIME ON BENEFICIAL) | FINAL ORDER |
| WATER USE PERMIT NO. 1819-S40J) | |
| GRANTED TO RUSSELL S. UNRUH) | |

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of July 13, 1988, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

FINAL ORDER

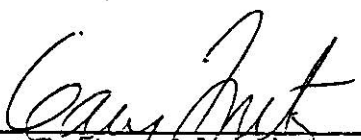
Application for Extension of Time on Beneficial Water Use Permit No. 1819-s40J by Russell S. Unruh is denied.

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 24 day of August, 1988.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
P O Box 1269
Glasgow, Montana 59230
(406) 228 - 2561

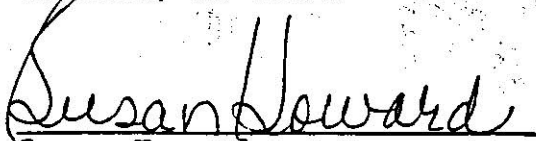
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 25th day of August, 1988, as follows:

Russell S. Unruh
Chinook, MT 59523

Bob Larson
Havre Field Manager
P O Box 1828
Havre, MT 59501

Matheson Ditch Company
RR 1, Box 53
Chinook, MT 59523


Susan Howard
Hearing Reporter

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

| | |
|---------------------------------------|-----------------------|
| IN THE MATTER OF THE APPLICATION) | |
| FOR EXTENSION OF TIME ON BENEFICIAL) | PROPOSAL FOR DECISION |
| WATER USE PERMIT NO. 1819-s40J) | |
| GRANTED TO RUSSELL S. UNRUH) | |

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 26, 1988 in Havre, Montana.

APPEARANCES

Permittee Russell S. Unruh appeared pro se.

Objector Matheson Ditch Company was represented by David Warburton.

Bob Larson, Manager of the Havre Field Office, Water Rights Bureau, Department of Natural Resources and Conservation (hereafter, Department) appeared at the hearing in this matter.

EXHIBITS

Department's Exhibit 1 consists of photocopies of a computer printout of "Water Right Listing by Source Name by Priority Date" which has the appropriators of water from the same area with rights junior to Russell S. Unruh's Permit No. 1819-s40J highlighted in yellow. Department's Exhibit was admitted without objection.

The Department file, containing the originals of the Application, the Objection, correspondence from the parties, Department processing documents, copies of the Notices of Action on Application for Extension of Time, the correspondence from the Department and of the Permit, was made available at the hearing for review by all

parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA, Section 85-2-312(3), states, in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration date of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. Provisional Permit No. 1819-s40J was issued to Russell S. Unruh on July 21, 1976 with a priority date of March 18, 1974. The Permit granted the Permittee the right to divert 250 acre-feet of water per year from Link Coulee, a tributary to Battle Creek, to be stored in a reservoir with a capacity of 250 acre-feet for new irrigation on 30 acres located in the NE 1/4 of Section 13, and supplemental

irrigation on 90 acres in the SW 1/4 of Section 12, 35 acres in the NW 1/4 and 30 acres in the E 1/2, both in Section 13, all in Township 35 North, Range 18 East, and on 27 acres in the W 1/2 of Section 18, Township 35 North, Range 19 East, Blaine County, Montana.

Under the terms of Permit No. 1819-s40J, the Permittee was required to have completed the permitted diversion and distribution works and applied the water to the beneficial use specified in the permit by July 1, 1978. The Permittee further was required to file the Notice of Completion with the Department on or before September 1, 1978. (Department file.)

3. Permittee requested and received three extensions of time in which to complete the permitted appropriation. Pursuant to the third (final) extension, granted November 29, 1985, Permittee was to have completed the permitted beneficial use on or before November 15, 1987 and a Notice of Completion filed with the Department on or before November 30, 1987. (Testimony of Bob Larson, Department file.)

The reason given by the Permittee for requesting the first extension of time was financial difficulty. The reason given by the Permittee for requesting the second extension of time was due to high interest rates, high cost of material and the failure of livestock prices to keep up with inflation. The reason given by the Permittee for requesting the third extension of time was insufficient funds. On the annual report required by a condition of the third extension of time and received by the Department on November 13, 1986, Permittee reported, "There was no action on this permit this year. The reason for no action is the same, financially (sic) unable to go ahead with the project". (Department file.)

4. On November 4, 1987, the Department received a fourth Application for Extension of Time from the Permittee. In response to question No. 3 on the Application, which requests the Permittee to "state below the reason(s) the project will not be completed as scheduled", the Permittee answered that, "This project has not been completed (sic) due to the sever (sic) economic condition of the cattle business - I simply could not spend the funds necessary to complete this project. With the recent upturn in cattle prices, I feel I may be able to complete the project within the extension asked for." Permittee requested an additional 3 years to complete the project. (Department file.)

5. The pertinent portions of the Application were published in the Chinook Opinion, a newspaper of general circulation in the area of the source, on November 11, 1987. Additionally, the Department served notice by first class mail on public agencies and individuals which the Department determined might be interested in or affected by the request for extension of time. (Department file.)

6. The Department received a timely objection to the Permittee's Application for Extension of Time from Matheson Ditch Company. (See Department file.) Therefore pursuant to 85-2-312(3), MCA, the Department held a hearing on the Application.

7. Permittee testified that in the spring of '73, the Soil Conservation Service had "topogged" the area, core drilled it and "everything" but after July 1, 1973 the Department said a permit was necessary and the preliminary work Permittee had done did not constitute a "start" so he had to go through the permit process which took 2 years. Permittee stated that he had the funds available in 1973 but by the time the Permit was issued, the price of building the reservoir had increased to double

the amount estimated in 1973. At that time, he did not feel he could build the reservoir, the way the economic conditions had been.

8. Permittee testified that each time he had received an Extension of Time from the Department for the completion of this project, it seemed like "we would be either into a drought or a bad cattle cycle where we were having a pretty ... bad time just holding the ranch together as it was. Things got a little better last year and I felt I could go ahead and build the reservoir so I applied for another extension...."

When asked if he could complete the project within the time requested on the Extension, Permittee replied that he had "great hopes of doing it this year, but now we're running into the same...thing we have been running into, we don't know what we're going to do with our cows." He stated he had accumulated some funds to where he thought he could go ahead with it this year but he did not want to do something that would cause him to go "belly up". He said if he could get an extension for 3 years he should be able to get it done by that time or forget it.

When asked if he had done any work on this project since the permit had been issued, Permittee replied he had not.

9. There are 44 junior appropriators who have perfected their permits and put water to beneficial use. (Testimony of Bob Larson.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. See Findings of Fact 1, 4, 5, and

6.

3. The holder of a Beneficial Water Use Permit is required to make a showing of good cause why the Permit time limits should be extended before the Department can extend time limits specified in the Permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. See MCA 85-2-312(3).

4. The Permittee has not proceeded with due diligence to develop the appropriation right granted to him by Permit No. 1819-s40J.

Permittee, by his own testimony, established that nothing has been done toward the completion of this project since Permit issuance in 1974. See Findings of Fact 8.

Montana case law is replete with cases in which the courts have required an appropriator to show that he has diligently pursued perfection of his water right, before the right is granted a priority date as of the time the appropriation was initiated.

Under pre-1973 water law, courts have granted a priority date as of the date of initiating the appropriation only on that portion of the water right which was completed with reasonable diligence. See 79 Ranch, Inc v. Pitsch, 204 Mont. 4226 (1983); Montana Department of Natural Resources and Conservation v. Intake Water Company, 171 Mont. 416 (1976); Holmstrom Land Co. v. Newlan Creek Water District, 185 Mont. 409 (1979).

The Montana Water Use Act has incorporated the requirement for proceeding with due diligence. See In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 39787-76M by Marvin and Mary Anne Rehbein, Proposal for Decision, June 16, 1988. A Permittee is entitled to a priority date as of the filing of his application, see MCA 85-2-401(2); however, the appropriator is entitled to retain his priority date only if the terms of the permit are met.

These terms include the time limits for "commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use." MCA 85-2-312(2). The Montana Water Use Act clearly contemplates that the result of not meeting the time limits shall be loss or modification of the permit and its attendant priority date. See MCA 85-2-314.

In the present matter, Permittee has not made any attempt to begin the project for which he wishes to retain the present Permit. The main basis for his failure to act, according to the Permittee's testimony, is that he has not had sufficient funds to spend on the project without jeopardizing the solvency of his ranch. This is not a sufficient reason for granting an extension of time, especially when 44 junior permittees have taken the risk of installing water systems in attempts to perfect water rights in the same area as Mr. Unruh's proposed project which is authorized by Permit 1819-s40J.

Ranching is a notoriously risky business. A rancher must weigh each expenditure to decide if the end result is worth the risk. If a water project is vital to the operation of his ranch, the project is generally given a high priority for the use of available funds. If he proceeds to complete his project with reasonable diligence, investing his time and money, he is entitled to reap the benefits of his efforts by retaining his Permit and its priority date. If he is unwilling to proceed toward perfection of his Permit, then he must "step out" of the line of priorities, and return when and if he feels secure in proceeding with the proposed project. To allow an appropriator to do otherwise, that is, to retain a priority date for some possible future development which may or may not occur, penalizes other water users and potential water users who would be willing to take the risk and develop the water for immediate beneficial use. See generally, In the Matter of the Proposed Revocation of Beneficial Water Use Permit No. 4516-g410, October 15, 1987 Final Order.

There is nothing in the statutory law or case law of Montana to support the idea that a Permittee should be allowed to retain a water right for which no work has been done, as against junior water users and potential water users. Such a holding would allow a Permittee to delegate the risks to other water users so that he may later reap the possible rewards of having obtained a Permit for which he himself has taken no risk and done no work.

The Permittee has not shown by a preponderance of the evidence in the record that he has been unable to perfect the Permit due to physical factors beyond his control. The record indicates that 44 junior appropriators were able to perfect their permits in the period of time Permittee decided not to take the financial risk. (See Department Exhibit 1 and Finding of Fact 9.)

The Permittee, having failed to show due diligence, has not shown good cause why an Extension of Time should be granted on Beneficial Water Use Permit No. 1819-s40J.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Extension of Time on Beneficial Water Use Permit No. 1819-s40J by Russell S. Unruh is denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the proposed order. Any party adversely affected by the Proposal for decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave. Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.


Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator.

A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA 2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision. 2

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Done this 13 day of July, 1988.


Vivian Lightizer, Hearing Examiner
Department of Natural Resources
and Conservation
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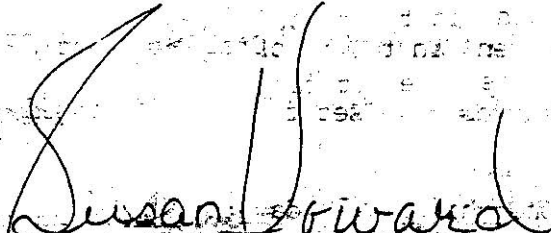
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served by mail upon all parties of record at their address or addresses this 18th day of July, 1988, as follows:

Russell S. Unruh
Chinook, MT 59523

Matheson Ditch Company
RR 1, Box 53
Chinook, MT 59523

Bob Larson
Havre Field Manager
P O Box 1828
Havre, MT 59501


Susan Howard
Hearing Reporter

CASE # 1819